



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

CWA/165705

PRELIMINARY RECITALS

Pursuant to a petition filed April 29, 2015, under Wis. Admin. Code, §HA 3.03, to review a decision by TMG, a consulting agency of the Include, Respect, I Self-Direct (IRIS) agency, to discontinue IRIS eligibility, a hearing was held on July 28, 2015, by telephone. Hearings set for May 19, June 9, and July 7, 2015 were rescheduled at the petitioner's request.

The issue for determination is whether petitioner continues to meet a nursing home level of care necessary for IRIS eligibility.

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representatives:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Amanda Justman
TMG
1 S. Pinckney St., Suite 320
Madison, WI 53703

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.
2. Petitioner enrolled in IRIS in 2014; at that time he met the level of care requirement for eligibility based upon a functional screen completed by a program screener.

3. Petitioner has digestive disorders including diverticulitis and reflux, chronic pain, a gait disorder, and suspected restrictive lung disease. He does not have a cognitive disorder, but does have depression and a history of substance use.
4. An annual reassessment was completed in March, 2015. A new functional screen was prepared. The screener noted that petitioner needs assistance with activities of daily living (ADLs) bathing and mobility in the home at the number 1 level. He also needs assistance with instrumental activities of daily living (IADLs) meal preparation, laundry/chores, and transportation. He was found to be a risk factor 1 (high risk of failing to obtain nutrition, self-care, or safety adequate to avoid significant negative health outcomes).
5. The functional screen result was that petitioner did not meet the nursing home level of care. By a notice dated March 24, 2015, the agency informed petitioner that IRIS services would end due to the negative functional screen.

DISCUSSION

The IRIS program was developed pursuant to a Medical Assistance waiver obtained by the State of Wisconsin, pursuant to section 6087 of the Deficit Reduction Act of 2005 (DRA), and section 1915(j) of the Social Security Act. It is a self-directed personal care program.

The federal government has promulgated 42 C.F.R. §441.450 - .484 to provide general guidance for this program. Those regulations require that the Department's agent must assess the participant's needs and preferences (including health status) as a condition of IRIS participation. *Id.*, §441.466. The Department's agent must also develop a service plan based on the assessed needs. Further, "all of the State's applicable policies and procedures associated with service plan development must be carried out ..." *Id.* §441.468.

An IRIS participant must be elderly, or an adult with physical or developmental disabilities. See IRIS General Information at www.dhs.wisconsin.gov/bdds/IRIS/general.htm. The physical disabilities must be such that the person requires a level of care equal to the level of a nursing home. DHS Medicaid Eligibility Handbook, §37.1.3. To qualify for a nursing home level of care a person must have a long-term care condition expected to last at least one year. See Overview of the Long Term Care Functional Screen, §1.2, found at www.dhs.wisconsin.gov/lcicare/FunctionalScreen/WebCT/instructions1.htm.

IRIS plans of care are updated when a participant requests a change in the plan. See IRIS Program Policies found at www.dhs.wisconsin.gov/bdds/IRIS/IRISPolicySummary.pdf. The plans also are updated at least on a yearly basis.

The Department has developed a computerized functional assessment screening system. The system relies upon a face-to-face interview with a quality assurance screener who has at least a bachelor of science degree in a health or human services related field, with at least one year of experience working with the target populations (or, if not, an individual otherwise specifically approved by the Department based upon like combination of education and experience). The screener asks the applicant, or a recipient at a periodic review, questions about his or her medical conditions, needs, cares, skills, activities of daily living, and utilization of professional medical providers to meet these needs. The assessor then submits the Functional Screen Report for the person to the Department's Division of Disability and Elder Services. The Department enters the Long Term Functional Screen data into a computer program to see if the person meets any of the required levels of care. If the assessor enters information into the functional screen correctly, then it is assumed that the computer will accurately determine the level of care.

Wis. Admin. Code, §DHS 10.33(2)(c) defines comprehensive functional capacity:

(c) *Comprehensive functional capacity level.* A person is functionally eligible at the comprehensive level if the person requires ongoing care, assistance or supervision from another person, as is evidenced by any of the following findings from application of the functional screening:

1. The person cannot safely or appropriately perform 3 or more activities of daily living.
2. The person cannot safely or appropriately perform 2 or more ADLs and one or more instrumental activities of daily living.
3. The person cannot safely or appropriately perform 5 or more IADLs.
4. The person cannot safely or appropriately perform one or more ADL and 3 or more IADLs and has cognitive impairment.
5. The person cannot safely or appropriately perform 4 or more IADLs and has cognitive impairment... [No. 6 omitted as irrelevant to this case] .

Comprehensive functional capacity level is equivalent to nursing home level. See Wis. Stat., §46.286. Although the above definition is found in the administrative code chapter relating to the Family Care Program, Division of Hearings and Appeals administrative law judges have applied the definition to the IRIS program as well. In August, 2014, the Deputy Secretary issued a Final Decision in case no. CWA-157032 holding that the code definition does not apply to the IRIS program, thus entailing that the results of the functional screen would be the final word in the level of care determination. As noted in the petitioner's brief, that decision was vacated by the Department in April, 2015, as part of a settlement of a Circuit Court appeal of that case. Thus it is evident that the definition of comprehensive, nursing home level of care for IRIS is as set out in Wis. Admin. Code, §DHS 10.33(2)(c).

Using the code definition, petitioner appears to meet §DHS 10.33(2)(c)2. Petitioner needs assistance with two ADLs, bathing and mobility, and at least one IADL. This is an example of the code definition being perhaps overly generous in defining nursing home level of care. Petitioner's level of required assistance is low, typically on what he describes as bad days, and he has adaptive equipment to help him perform these ADLs (he did not have the equipment when he was assessed in 2014; see page D4 of the agency's exhibit). His current service plan provides only for supportive home care assistance with chores, laundry, and shopping; petitioner's supports do not include personal care assistance with bathing, mobility, or putting on shoes and socks (petitioner argued during the hearing that he also needs assistance with dressing because he cannot put on shoes and socks).

I believe that a case could be made that despite the functional screen showing that petitioner needs assistance with bathing and mobility at the number one level of "Help (supervision, cueing, hands-on assistance) needed – helper need NOT be present," in actuality he can safely and appropriately perform those activities most of the time. See page C3 of the agency's exhibit for the quoted language. I am unaware of any other decision by the Division of Hearings and Appeals to make that point, however, nor am I aware of any direction from the Department that such a position can be taken. The administrative code definition does not differentiate between substantial need for assistance and less significant or occasional need for assistance. For those reasons, I conclude that petitioner continues to meet the nursing home level of care as defined in the Wisconsin Administrative Code, §DHS 10.33, because the screener found that he needs assistance with two ADLs and at least one IADL.

CONCLUSIONS OF LAW

Petitioner continues to meet the nursing home level of care as defined in the Wisconsin Administrative Code.

THEREFORE, it is

ORDERED

That the matter be remanded to TMG agency with instructions to continue petitioner's nursing home level of care eligibility for IRIS purposes and to continue his IRIS eligibility if he still meets all other eligibility criteria. The agency shall take the action within 10 days of this decision.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

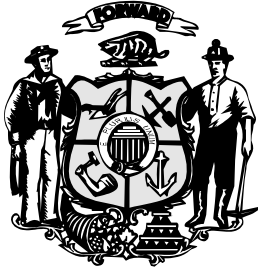
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 31st day of 2015

\sBrian C. Schneider
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on July 31, 2015.

Bureau of Long-Term Support
april.kieler@drwi.org